Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
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v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, IN NO. 83-997

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The American Federation of Labor and Congress of Industrial Organization (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of respondent Air Line Pilots Association, International, in No. 83-997. Counsel for Messrs. Thurston, Clark and Parkhill has declined to consent to the filing of that brief.

The AFL-CIO is a federation of 95 national and international unions having a total membership of approximately 13,500,000 working men and women. The AFL-CIO submits this brief solely to address the issue whether unions may be held liable for monetary relief under the Age Discrimination in Employment Act, a question of obvious importance to the affiliated unions of the AFL-CIO and their members.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, IN NO. 83-997

SUMMARY OF ARGUMENT

1. Section 7(b) of the Age Discrimination in Employment Act ("ADEA") requires that all "amounts owing" under that Act be treated for purposes of remedy as unpaid minimum wages or overtime compensation under §§ 16 and 17 of the Fair Labor Standards Act ("FLSA").

2. Sections 16 and 17 of the FLSA provide in turn that in an action for unpaid minimum wages or overtime compensation it is the wronged employee's *employer* who is solely liable for a monetary award. That the employer is the sole source for an award of monetary relief in such FLSA actions is not happenstance but rather a direct expression of the point of the Act as a whole. As the legislative history of the FLSA shows, Congress was concerned that employers who pay employees less than the minimum wage or less than the required amount of overtime compensation would achieve an unfair economic advantage over competitors who abide by the requirements of the law. Such an unfair competitive advantage can only be removed if an employer is made to bear the full responsibility for paying what was wrongfully withheld.

3. Congress' choice to incorporate the FLSA's remedial scheme for unpaid minimum wages and overtime compensation into § 7 of the ADEA was an informed and carefully considered one. As this Court has pointed out, "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard v. Pons*, 434 U.S. 575, 581 (1981). "This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Id.* at 582.

Congress used Title VII of the Civil Rights Act of 1964 as the model for the scheme of substantive prohibitions

enacted in the ADEA. But in shaping the ADEA Congress rejected the remedial scheme of Title VII, which provides for monetary remedies against unions. Instead, Congress adopted, indeed incorporated, the remedial scheme of the FLSA, which has a different remedial premise from that of Title VII. Against this background, Congress must be understood to have adopted not only the words of the FLSA but also its remedial premise: that the employer is to bear the full monetary consequences of his wrongful conduct.

4. There is no one "correct" remedial scheme for a statute such as ADEA. There is legitimate room for debate whether the FLSA scheme or some other scheme is best suited for enforcement of the ADEA. Whatever the relative wisdom of the various options, the choice is for Congress to make. By incorporating the FLSA provisions governing monetary relief for unpaid minimum wages and overtime compensation, Congress chose to place monetary liability for violations of the ADEA solely upon the employer.

ARGUMENT

The court below held that in Age Discrimination In Employment Act cases employers are solely liable for backpay found due and owing to their employees. That holding is correct as we now show.[1]

1. In *Lorillard v. Pons*, 434 U.S. 575, 578-79 (1978), this Court recognized that "[p]ursuant to § 7(b) of the

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[1] In this brief we address the third question stated by Trans World Airlines in its opening brief:

> 3. Whether a labor union which jointly violates the Age Discrimination in Employment Act with an employer is absolved as a matter of law from liability for back pay?

We note at the outset, however, that none of the plaintiffs in this case has raised that question. That being so, we submit that here, as in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91-95 & n.25 (1981), an employer may not ask this Court to determine whether the plaintiffs are granted a right to recover against a union.

[ADEA], violations of the ADEA generally are to be treated as violations of the FLSA. . . . [A]nd the rights created by the ADEA are to be 'enforced in accordance with the powers, remedies and procedures' of specified sections of the FLSA." See also *Lehman v. Nakshian*, 453 U.S. 156, 163 (1981). And, that provision is the only one that specifies the monetary relief to be accorded for ADEA violations. Thus, § 7(b) of the ADEA and the provisions of the FLSA incorporated therein control this case.

Of particular pertinence here, § 7(b) of the ADEA expressly provides: "Amounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title [*i.e.*, §§ 16 and 17 of the FLSA]." As the unqualified term "amounts owing" indicates, Congress intended all possible "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits" under the ADEA to be treated as unpaid minimum wages or overtime compensation. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13 (1978). Section 7(b), then, constitutes a "direct[ion] that actions for lost wages under the ADEA be treated as actions for unpaid minimum wages or overtime compensation under the FLSA. . . ." *Lorillard*, 434 U.S. at 582.

2. Sections 16 and 17 of the FLSA—the sections specifically incorporated in § 7(b) of the ADEA—provide that in an action for unpaid minimum wages or overtime compensation only the "employer" may be held liable for a monetary award. Section 16 of the FLSA is the provision that defines the civil action for monetary relief based on a claim of unpaid minimum wages or overtime compensation that may be brought by either the affected employee or by the Secretary of Labor. Section 16(b), as codified in 29 U.S.C. § 216(b), states in pertinent part:

> Any *employer* who violates the provisions of section 206 ["Minimum Wage"] or section 207 ["Maximum hours"] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be . . . [Emphasis added.] [2]

The FLSA defines "employer" as "not includ[ing] any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 203(d). It is therefore plain that § 16(b) does not authorize the courts to require a union to provide monetary relief for unpaid minimum wages or overtime compensation.

Section 16(c), 29 U.S.C. § 216(c), provides, in turn, that the Secretary of Labor may bring an action to recover the amounts that affected employees would be entitled to recover under § 16(b). Section 16(c) states that "[t]he Secretary is authorized to supervise the payment of unpaid minimum wages or the unpaid overtime compensation owing to any employee," and that the employee's acceptance of such payment shall constitute a waiver by the employee of his right to sue under § 16(b). Section 16(c) further provides that the Secretary may bring an action "to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages," and that an employee's right to sue under § 16(b) "shall terminate upon the filing of a complaint by the Secretary in an action under [§ 16(c)]. . . ."

As the interrelationship of the two sections makes clear, "[a] suit under § 16(c) . . . is essentially a representative action brought to enforce the private rights described

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[2] The remainder of the quoted sentence states: "and in and additional equal amount as liquidated damages." This entitlement to liquidated damages is qualified by the affirmative defense in 29 U.S.C. § 260. The ADEA treats the issue of liquidated damages in a different fashion. Section 7(b) of the ADEA, in a proviso to the "amounts owing" sentence quoted *supra*, at 4, states "[t]hat liquidated damages shall be payable only in cases of willful violations of this chapter."

in § 16(b)." *EEOC v. Corry Jamestown Corp.*, 719 F.2d 1219, 1221 (3d Cir. 1983). See also *Wirtz v. Jones*, 340 F.2d 901, 904 (5th Cir. 1965) ("Under § 16(b) the employees may sue the employer for backpay, and under § 16(c) the Secretary . . . may bring the action"). Section § 16(c), in short, does not expand the parties who may be sued for unpaid minimum wages or overtime compensation, nor the measure of monetary relief that may be sought, beyond what is authorized by § 16(b). See S. Rep. No. 640, 81st Cong., 1st Sess. 8 (1949) (describing § 16(c) as an alternative procedure for recovering the unpaid wages that can be recovered from an employer under § 16(b)).

The same result obtains under § 17 of the FLSA. Section 17 authorizes the Secretary of Labor to bring suit for injunctive relief to restrain violations of the FLSA.[3] In 1961, Congress repealed a proviso to § 17 that prohibited a court in a suit for injunctive relief brought by the Secretary from ordering "the payment of unpaid minimum wages or unpaid overtime compensation." Pub. L. 81-393, § 15 (1949). In place of that proviso, the 1961 Congress inserted language stating that the relief available in a § 17 action may "include . . . the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter." Pub. L. 87-30, § 12(b) (1961), codified at 29 U.S.C. § 217. This language was added to give the Secretary a more efficient means, free from the various procedural requirements attendant to a § 16 action, to obtain payment of unpaid minimum wages or overtime compensation. See H.R. Rep. No. 75, 87th Cong., 1st Sess. 27-28 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 39-40 (1961). The Conference Report accompanying the legislation makes clear that this additional means to recover unpaid minimum wages or overtime compensation is, like a § 16 action, directed solely at employers:

> Under [§ 17], the Federal district courts would be authorized, in injunction actions brought by the Secretary of Labor, to issue court orders requiring *employers* to cease unlawful withholding of minimum wages and overtime compensation found by the court to be due to employees under the act. [H.R. Conf. Rep. No. 327, 8th Cong., 1st Sess. 20 (1961) (emphasis added); see also H.R. Rep. No. 75, *supra* at 37; S. Rep. No. 145, *supra* at 51.]

That the employer is the sole source for an award of monetary relief under the FLSA is not a happenstance but rather a direct expression of the point of the Act as a whole. Congress was concerned that employers who pay less than the minimum wage or less than the required amount of overtime compensation would achieve an unfair economic advantage over competitors who abide by the requirements of the law. Thus, in § 2 of the FLSA, 29 U.S.C. § 202, Congress declared,

> that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . (3) constitutes an unfair method of competition in commerce; . . . .

Such an unfair competitive advantage can only be removed if an employer is made to bear the full responsibility for paying what was wrongfully withheld.

The need to eradicate this unfair competitive advantage has been a consistent theme as Congress has refined the remedial scheme of the FLSA over the years. In 1949, when Congress added subsection (c) to § 16 of the FLSA, for the first time authorizing the Secretary of Labor under certain circumstances to sue under § 16 for recov-

[3] As this Court recognized in *Lorillard*, "the courts [have] consistently declared that injunctive relief [under the FLSA] [is] not available in suits by private individuals but only in suits by the Secretary." 434 U.S. at 581.

ery of unpaid minimum wages,[4] the Senate Report justified that new power in part by reference to the following testimony offered by the Secretary:

> [T]he existence of such power would tend to discourage employers from failing to pay minimum wages or overtime compensation, thus nullifying the competitive advantage which is created when employees fail to take action to recover unpaid back wages. The additional power being requested would foreclose an employer from benefiting from his violation of the act when injunction action is not appropriate. [S. Rep. No. 640, 81st Cong., 1st Sess. 7 (1949).]

In 1961, when Congress amended § 17 to permit the Secretary to recover unpaid minimum wages or overtime compensation in an injunction action, see *supra at* 6, a prime objective was to provide an additional means for eradicating unfair wage competition:

> The proposed amendment would make [efforts to achieve compliance] much more effective by providing a practical method for requiring payment of the amounts of any wages or overtime compensation which an employer has failed or refused to pay, as required by the act. Placing the probability of financial liability on those employers who are presently careless of their obligations under the act would increase the level of compliance with the statute, and would protect complying employers from the unfair wage competition of the noncomplying employers. [H.R. Rep. No. 75, *supra*, at 28; S. Rep. No. 145, *supra*, at 40.]

3. Congress' "cho[ice] to incorporate the enforcement scheme of the [FLSA] into § 7 of the ADEA," *Lehman v. Nakshian*, 453 U.S. at 163, was an informed and carefully considered one. The *Lorillard* Court quoted the

[4] Until 1949, only the affected employee could bring suit under § 16. Fair Labor Standards Act of 1938, ch. 676, § 16, 52 Stat. 1069 (1938); Pub. L. No. 81-393, § 14 (1949).

statement of Senator Javits, one of the floor managers of the bill, that ". . . in fact [the ADEA] incorporates by reference, to the greatest extent possible, the [enforcement] provisions of the [FLSA]." 434 U.S. at 582. The Court emphasized too that Congress in enacting the ADEA exhibited great "selectivity . . . in incorporating provisions and in modifying certain FLSA practices. . . ." *Id.* at 582. "[I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Id.* at 581. *"This selectivity . . . strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."* *Id.* at 582 (emphasis added).

Congress used Title VII of the Civil Rights Act of 1964 as the model for the scheme of substantive prohibitions enacted in the ADEA. *Lorillard*, 434 U.S. at 584, 585. But Congress rejected the remedial scheme of Title VII, which provides for monetary remedies against unions, *Lorillard*, 434 U.S. at 584-585. Instead, Congress adopted, indeed incorporated, the scheme of the FLSA, which as we have shown, has a different remedial premise from that of Title VII. *Id.* at 584-585; see *supra*, at 4-8. Against this background, Congress must be understood to have adopted not only the words of the FLSA but also its remedial premise: that the employer is to bear the full monetary consequences of his wrongful conduct.

4. TWA's main argument from the language of the ADEA is that the following sentence in § 7(b) is intended to depart from this remedial premise and to provide for union liability:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limi-

> tation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.[5]

But, viewed in context, this sentence cannot be understood to provide for any additional form of monetary relief, and certainly not for any new source for monetary relief. The language quoted by TWA directly follows the sentence that provides that all "amounts owing" under the ADEA "shall be deemed to be" unpaid minimum wages or overtime compensation for purposes of § 16 and § 17 of the FLSA. Consistent with that encompassing declaration, the only monetary relief described in the sentence relied upon by TWA is relief to "*enforce the liability for amounts deemed to be unpaid minimum wages or overtime compensation under this section*" (emphasis added); the relief for which the FLSA makes *employers* solely liable.[6] Based on the language of § 7(b), this Court in *Lorillard* found that "Congress must have meant the phrase 'legal relief' to refer to judgments 'enforcing . . . liability for amounts deemed to be unpaid minimum wages or overtime compensation.'" 434 U.S. at 583, n.11. And, every court of appeals that has considered the question has concluded that the only monetary relief permitted under the ADEA is that which is authorized with respect to unpaid minimum wages or overtime compensation in §§ 16 and 17 of the FLSA.[7]

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[5] This passage is restated in § 7(c), without repetition of the examples of appropriate relief.

[6] The departure from the FLSA scheme that *is* effected by the sentence relied up by TWA is to authorize private parties to bring injunction actions. See *Lorillard*, 434 U.S. at 581. In addition, the sentence serves to make clear that the courts are to provide forms of available equitable relief appropriate to the types of employment actions that would likely be the subject of age discrimination suits.

[7] See *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984) (the provision that "amounts owing . . . shall be deemed to be unpaid minimum wages . . ." is "dispositive

TWA attempts to buttress its position by reference, at p. 41 of its brief, to passages in the legislative history indicating that Congress meant the ADEA to apply to unions as well as employers. But there is no dispute that the ADEA contains both prohibitions and remedies that apply to unions. The question here is whether Congress intended to make unions liable for monetary awards. None of the passages cited by TWA is addressed to this question. Certainly, none indicates a congressional intent to diverge from the FLSA remedial scheme that Congress chose to incorporate in the ADEA. That scheme provides that where a prohibition is equally applicable to employers and unions, only the employer is made liable for monetary relief.[8]

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of the drafters' intentions," and precludes any other monetary relief); *Slatin v. Stanford Research Institute*, 590 F.2d 1292, 1295 (4th Cir. 1979) ("the broad language of [§§ 7(b) and (c)]—'The court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter'—is limited by the[] specific references to unpaid wages and overtime"); *Vasquez v. Eastern Air Lines, Inc.*, 579 F.2d 107, 109 (1st Cir. 1978) (ADEA's reference to "legal or equitable relief" is "limited by . . . the fact that amounts owing as a result of a violation are to be treated as if they were unpaid minimum wages or unpaid overtime compensation"); *Perrell v. Financeamerica Corp.*, 726 F.2d 654, 657 (10th Cir. 1984) ("every time the issue of permissible scope of damages has been addressed, each circuit court has held that the ADEA is limited to the damages specifically enumerated"—i.e., damages authorized by § 16 for unpaid minimum wages or overtime compensation); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 685-86 (7th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 453 (1982); *Wedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 809-10 (8th Cir. 1982); *Naton v. Bank of California*, 649 F.2d 691, 699 (9th Cir. 1981); *Dean v. American Security Ins. Co.*, 559 F.2d 1036, 1038 and n.6 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 839-40 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

[8] It is particularly striking that in the case of a retaliation violation under § 15(a)(3) of the FLSA, 29 U.S.C. § 215(a)(3)—which may be committed by a union as well as by an employer—the FLSA expressly provides for monetary relief only against the employer:

> Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as

TWA also argues that this Court should interpret the ADEA as if it incorporates the remedial scheme of Title VII or of the National Labor Relations Act. But, as we have already shown, Congress had the option in fashioning the ADEA to adopt the remedial schemes of Title VII or the NLRA and, as this Court stated with specific reference to Title VII, "Congress rejected that course in favor of the FLSA [scheme]." *Lorillard*, 434 U.S. at 584-585. TWA asks no less than that this Court substitute a scheme that Congress rejected for one that it chose to adopt.

Finally, TWA suggests that "logic" and "policy" militate against a literal interpretation of the remedial provision of ADEA. Implicit in this suggestion is the notion that there is only one "correct" remedial scheme for a statute such as ADEA—the one that provides that where there are two or more defendants each should be held monetarily liable according "to the degree that they are each culpable." TWA Br. at 44. But, as we have already shown, the objective of the FLSA to eliminate unfair competition among employers points to a different remedial approach. And, as this Court has recognized in another context, there is legitimate room for debate whether deterrence of wrongdoing and enforcement of federal statutes is better assured where "most or all wrongdoers will be held liable and thus share the consequences of the wrongdoing" or where there is "the possibility . . . that a single participant could be held fully liable for the total amount of the judgment." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 (1981). Certainly, Congress is entitled to prefer the latter scheme where, as is the paradigm case under the ADEA, the commission of the wrong requires the partici-

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may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. [§ 16(b), FLSA, 29 U.S.C. § 216(b).]

pation of the defendant who Congress determines is always to be held "fully liable."[9] Whatever the relative wisdom of these diverse options, the choice is for Congress to make. And, by incorporating in the ADEA the FLSA provisions governing monetary relief for unpaid minimum wages and overtime compensation, Congress chose to place monetary liability for violations of the ADEA solely upon the employer.[10]

CONCLUSION

For the foregoing reasons, if the issue of union liability for monetary relief under the ADEA is decided by this Court, the decision of the Second Circuit on this issue should be affirmed.

Respectfully submitted,

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[9] As one court has pointed out in the context of an Equal Pay Act case, "if employers are aware that they alone will bear the economic consequences of Equal Pay Act violations, a greater incentive would exist for resisting coercive pressures placed upon them by . . . unions." *EEOC v. Ferris State College*, 493 F. Supp. 707, 716 (W.D. Mich. 1980).

[10] If, contrary to our submission, the Court determines that unions may be held monetarily liable under the ADEA, the case should be remanded for a determination by the lower courts of the appropriate principles for deciding the relative amount of monetary liability that the employer and the union should bear. That issue has not yet been addressed by either of the courts below and should not, in the first instance, be decided by this Court.